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No. 90-1727

In the
Supreme Court of the United States

OCTOBER TERM, 1990

WESTVACO COMPANY, RICHARD LAFFARGUE
AND LORENZO SANCHEZ,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. BURNIM
508 Donahue Building
Beacon Hill
41 Temple Street
Boston, Massachusetts 02114
(617) 573-8614
Counsel of Record for Respondent

BAILEY MAN & SLADE, INC. BOSTON, MASSACHUSETTS

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

WESTVACO COMPANY, ET AL.,
Petitioners,

v.

DOLORES SWEENEY,
Respondent

STATEMENT OF THE CASE

This is a diversity action tried under Massachusetts state tort law (App. A at 2a).[1] The respondent, plaintiff, Dolores Sweeney was awarded compensatory damages by a jury for loss of consortium

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[1]Reference herein to the opinion of the Court of Appeals for the First Circuit and to the decision of the United States District Court for the District of Massachusetts (Ponsor, U.S.M.) will be to Appendix A ("App. A") and Appendix B (App. B"), respectively, of petitioners' Petition for Writ of Certiorari which will be referred to hereinafter as "Pet. Cert.".

caused by the negligent infliction of emotional distress upon her husband George Sweeney by Westvaco Company ("Westvaco") and three of its supervisory employees (App. A at 6a).

George Sweeney worked for more than twenty-nine years for Westvaco (App. A at 6a). He had "overcome a background of adversity (birth defects, deafness in childhood, loss of a parent), to become, in his adulthood, a conscientious, kind, and dedicated employee, liked and respected by his coworkers." (App. A at 6a). Over a period of several months, George was "harassed, taunted, and humiliated" by the three supervisory employees (App. A at 8a). "[T]he evidence permitted the jury to find behavior of unusual callousness or cruelty." (App. A at 9a). George suffered a "serious emotional

breakdown" of dire and permanent consequences (App. A at 9a). Briefly, and starkly stated: "He cannot work or maintain ordinary human relationships. His wife has become, in effect, a caretaker (as one expert witness testified), like a wife with a husband who has Alzheimer's disease." (App. A at 9a).

This action was commenced in Massachusetts Superior Court against Westvaco. Westvaco removed the action to federal court on the basis of diversity of citizenship jurisdiction (App. A at 10a). Westvaco and two of the supervisors are petitioners here.[2] At the commencement

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[2]In federal court Dolores Sweeney added the three supervisory employees as defendants (App. A at 10a), one of whom, Louis Ronzoni, was dismissed from the case as a nondiverse party by the First Circuit under authority of Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2225-26 (1989). (App. A at 46a-53a).

of the action in March 1986, Dolores and George Sweeney had been married for over thirty-five years. At the time of the trial in June 1989, Dolores Sweeney was fifty-seven years old and George Sweeney was sixty-one.[3]

After discovery was completed, "[i]n its pretrial memorandum, Westvaco told the court that the case raised 'no jurisdictional issues,' and it 'agreed with plaintiff's statement' that the case was a simple tort suit that did not present 'any unusual issues of law.'" (App. A at 23a-24a). Only after the jury returned a $1.5 million verdict for the plaintiff did Westvaco advance a defense of preemption under § 301 of the Labor Manage-

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[3]Brief and Addendum for the Plaintiff-Appellant Dolores Sweeney in the appeal before the First Circuit, hereinafter "Pl. Br. 1st Cir." at 2.

ment Relations Act, 29 U.S.C. § 185(a). (App. A at 3a-4a). "The Magistrate, who ruled on pretrial motions, conducted the trial, held a charge conference, and heard all the parties' arguments, wrote that Westvaco did not give 'notice of any pre-emption issue' until . . . Westvaco filed its motion for judgment notwithstanding the verdict." (App. A at 24a).

The Magistrate, believing that pre-emption under § 301 was "jurisdictional" and could be raised at any time, "reluctantly" allowed Westvaco's motion for judgment notwithstanding the verdict (App. B at 2b). The Magistrate, however, stated that if the normal rules of issue preservation were to be applied, the court "would not hesitate to deny" the motion (App. B at 17b-18b). In conclusion, the Magistrate was moved to add:

> In the introduction to this Memorandum the court stated that it was granting defendants' motion for judgment n.o.v "reluctantly." This sentiment bears repeating. The trial in this case was long and painful, particularly for the plaintiff and her husband. The court's decision now must obviously heighten that distress.

(App. B at 46b).

The First Circuit found it unnecessary to reach the merits of whether § 301 applied to the circumstances of this case. It found that the Magistrate was correct in finding that the defendants would ordinarily be deemed to have waived their pre-emption defense (App. A at 24a-25a). The court, however, rejected the Magistrate's conclusion that § 301 pre-emption was "jurisdictional" in the sense that it was not subject to waiver. Instead, the court concluded that "in an appropriate case, a party can waive § 301

pre-emption; the parties do not have an absolute right to raise that argument at any stage they wish in the proceedings." (App. A at 42a). The First Circuit vacated the Magistrate's judgment for the defendants and remanded with instructions to reinstate the jury's verdict for the plaintiff (App. A at 53a-54a).

In so holding, the First Circuit agreed with the Ninth Circuit, Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir.1987), the Sixth Circuit, Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.), cert. denied, 484 U.S. 820 (1987), and the Seventh Circuit, National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, 784 F.2d 817, 825-26 (7th Cir.1986). (App. A at 42a).

The court distinguished the Third Circuit case of Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., 665 F.2d 466 (3d Cir. 1981), which was relied upon as a contrary holding by the defendants. In Carpenters, the Third Circuit dismissed an appeal as premature, holding that the decision below was not final until attorney fees had been assessed. In dismissing, the Third Circuit simply stated that "if the issue of pre-emption were not jurisdictional, a strong case for waiver could be made on [the] facts." Id. at 469-70. The First Circuit found defendants' reliance on Carpenters misplaced. Rather, the court stated, "this single sentence, dicta in context, made without analysis . . . makes that case weak support for Westvaco's claim." (App. A at

40a). Petitioners persist, offering to this Court, Carpenters as a "directly contrary holding" (Pet. Cert. at 17), and as the case constituting a conflict in the circuits (Pet. Cert. at 26).

After concluding that § 301 pre-emption is subject to waiver, the First Circuit considered whether, upon the facts of this case, it would exercise its discretion to address an issue that had not been timely raised (App. A at 42a-46a). The court distinguished on the facts, not on principles of law, Apponi v. Sunshine Biscuits, Inc., supra, and National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, supra, offered by the defendants as cases where "even if a party, by not raising the pre-emption defense, can waive it, courts sometimes forgive and overlook a failure to raise a

legal issue at the proper time." (App. A at 42a). The court found that it would be unfair in the instant case to relieve the defendants of their failure, "for the circumstances simply do not call for an exception." (App. A at 44a).

> Westvaco could have raised pre-emption at any point before the jury deliberated. There is no good reason for its neglect. The unfairness is obvious and aggravated here, by the fact that, at least arguably, Mrs. Sweeney might have tried to reshape her case to avoid any need for contract interpretation had she known of the problem sooner.

(App. A at 44a).

Chief Judge Breyer, writing for the court in a unanimous decision from which the petitioners did not seek rehearing (Pet. Cert. at 21), concluded:

> Given the facts that the parties had the legal power to try this case as a simple tort suit, that Westvaco (until it lost) chose to do so, that

> plaintiff spent considerable time, effort, and expense in gaining victory, we believe it fair to hold the parties to the legal theories they asserted in this case prior to the jury's award. We have the legal power to require this result. And, we have exercised that power.

(App. A at 53a).

The petitioners, having emotionally distressed, exhausted and judicially prejudiced the respondent, now seek to employ certiorari to rescue themselves from their own negligence in failing to raise, until after a jury verdict, the issue of the potential application of § 301.

SUMMARY OF ARGUMENT

I. The national labor policy favoring grievance-arbitration resolution of labor disputes is not implicated, much less threatened, by the First Circuit's decision. Petitioners' argument that the First Circuit's decision that § 301 is

subject to waiver allows respondent to "sidestep" national labor policy is without substance, because the First Circuit did not decide § 301 applied to the circumstances of the case at bar, and if there is any sidestepping here it is raised by the conduct of the petitioners, who having suffered an adverse verdict, and not having raised the question of the applicability of § 301 pre-emption until after the verdict, now seek to sidestep the rules of practice that govern litigation in the federal courts. The ruling below is consistent with both national labor policy and orderly judicial administration. The integrity of the policy is not undermined; all one need do is invoke by any one of the numerous opportunities afforded in the procedural and trial practice. In addition, the peti-

tioners had "no good reason for their neglect" and, in the circumstances of this case, "unfairness is obvious and aggravated here."

II. This case does not present the issue sought to be reviewed in the clear and unequivocal manner necessary for certiorari review. The petitioners, now in extremis, attempt to cast this matter simply as a labor-management case, endeavoring to posture it as a simple and clean question respecting the pre-emptive reach of § 301. The underlying facts and the decision of the First Circuit belie this. As a matter of simple justice, it cannot be said that harassment, taunting, and humiliation, "behavior of unusual callousness or cruelty," are rights of management under any labor agreement. Additionally, the First Circuit found it

unnecessary to reach the question of whether § 301 actually applied to the circumstances of this case. The petitioners' representation that "[t]he instant case presents this Court with an opportunity to address directly the issue of whether an otherwise valid assertion of § 301 preemption may be waived by a party or raised at any time" is an overstatement of the record.

III. This case is not appropriate for certiorari review as the judgment is supportable on the alternative grounds that: (1) The claim challenging defendants' conduct was not pre-empted, because it was "harassing, taunting, and humiliating" conduct, of "unusual callousness or cruelty," behavior that cannot reasonably be within the rights of an employer under any contract; (2) Respondent's claim was

independent under state law, not subject to pre-emption; and (3) Respondent was not a party to the labor agreement, had no access under it, was not bound by it, thus her claim was not pre-empted.

IV. There is no conflict between the circuits on the question of whether a § 301 pre-emption defense is waivable. The Third Circuit case upon which petitioners rely as establishing a contrary holding is recognized as dicta; and the decisions of the Sixth and Seventh Circuit upon which they rely are distinguished on the facts, not on principles of law.

V. The ruling below that a § 301 pre-emption defense is waivable is consistent with this Court's decision in International Longshoremen's Association v. Davis; the reliance of the First Circuit

upon the distinction in Davis of choice-of-forum and choice-of-law pre-emption for purposes of distinguishing pre-emption under the NLRA from § 301 the LMRA is fully consistent with and does not undermine established labor policy.

REASONS FOR NOT GRANTING THE WRIT

I. THE NATIONAL LABOR POLICY FAVORING GRIEVANCE-ARBITRATION RESOLUTION OF LABOR DISPUTES IS NOT IMPLICATED, MUCH LESS THREATENED, BY THE FIRST CIRCUIT'S DECISION.

II. THIS CASE DOES NOT PRESENT THE ISSUE SOUGHT TO BE REVIEWED IN THE CLEAR AND UNEQUIVOCAL MANNER NECESSARY FOR CERTIORARI REVIEW.

III. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI REVIEW AS THE JUDGMENT IS SUPPORTABLE ON ALTERNATIVE GROUNDS.

(1) The Claim Challenging Defendants' Conduct Was Not Pre-empted.

(2) Dolores Sweeney's Claim Was Independent Under State Law, Not Subject to Pre-emption.

(3) Dolores Sweeney's Claim Was Not Pre-empted Because She Was Not A Party to The Labor Agreement.

IV. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION OF WHETHER A § 301 PRE-EMPTION DEFENSE IS WAIVABLE.

V. THE RULING BELOW THAT A § 301 PRE-EMPTION DEFENSE IS WAIVABLE IS CONSISTENT WITH THIS COURT'S DECISION IN INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS.

ARGUMENT

I. THE NATIONAL LABOR POLICY FAVORING GRIEVANCE-ARBITRATION RESOLUTION OF LABOR DISPUTES IS NOT IMPLICATED, MUCH LESS THREATENED, BY THE FIRST CIRCUIT'S DECISION.

The respondent is compelled at the outset to note that petitioners strive here to turn this case on its head. Their petition is replete with claims that the ruling below allows respondent to "sidestep" national labor policy embodied in § 301 respecting application of federal law and the use of bargained-for

grievance and arbitration procedures in the resolution of labor-management disputes (e.g., Pet. Cert. at 24, 47, 50). That is not so. The petitioners "do protest too much."

This record does not establish that § 301 applied to any, only to some, or preclusively to all the behavior of the petitioners, or at all to Dolores Sweeney's claim. (See Argument III).

More fundamentally, national labor policy favoring grievance-arbitration resolution of labor disputes is not at all threatened by the ruling below as petitioners would have this Court believe. This Court's jurisprudence under § 301 demonstrates its concern with shaping the federal common law so as to require appropriate utilization of the grievance-arbitration process. For exam-

ple, in Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-653 (1965), this Court held that a plaintiff could not, consistent with § 301, by-pass the grievance-arbitration procedure in order to pursue a state law claim for severance pay. This Court stated in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (citing Maddox, 379 U.S. at 653), that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness[.]"

The concerns underlying the decision in Mattox and its progeny are wholly inapposite to the case at bar. Even if the ruling below is left intact, as well it should be, the plaintiff who forgoes resort to the grievance-arbitration mechanism and elects to pursue state law

claims does so at the peril of having to overcome a properly asserted pre-emption defense.

Thus, "sidestepping" is not the issue. The true issue is the repeated failure by the petitioners to avail themselves properly of the numerous opportunities afforded by the established rules of procedure and trial practice to test the applicability of § 301 (e.g., discovery; motions to dismiss, for judgment on the pleadings, summary judgment, directed verdict).[4]

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[4]Petitioners' observe that in the removal context, § 301 pre-emption "overrides the 'well pleaded complaint' rule[,]" citing Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). (Pet. Cert. at 50-51). This is yet another hurdle for the "sidestepping" plaintiff, and as petitioners recognize, it "discourage[s] artful pleading[.]" (Pet. Cert. at 51). It points more to the adequacy of existing controls than to the need for an absolute refuge from "unartful" defense.

These failures are not disputed here.[5]

If there is a sidestepping issue presented here, it is raised by the conduct of the petitioners, who, having forgone multiple opportunities to raise their pre-emption defense, and having done so only in the face of an adverse jury verdict, now seek to sidestep the rules of practice that govern litigation in the federal courts. That the concerns for federal pre-emption may coexist with the orderly resolution of disputes has already been recognized by a number of the members of this Court.

In International Longshoremen's Association v. Davis, 476 U.S. 380, 391 (1986), where this Court applied so-

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[5]See Pet. Cert. at 14 n.5.

called "Garmon" pre-emption"[6] as "jurisdictional", in the sense that a grant of exclusive adjudicatory power to one forum precluded waiver in other fora, four Justices disagreed, concerned that the decision afforded a wait-and-see option disruptive to judicial administration:

> By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Davis, supra, 476 U.S. at 399 (Rehnquist, J., concurring in part, joined by Powell, J., Stevens, J., O'Connor, J.).

> Here Alabama, by application of a neutral statute with a pre-

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[6]San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (hereinafter "Garmon")

> cise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance. But it is this Court, not Congress, that has ordained the result. I believe the Court is mistaken in doing so, and I therefore cannot join Part II of its opinion.

Id. at 402-03.

Westvaco was surely as sophisticated as Dolores Sweeney in labor matters.[7]

Accordingly, the decision that § 301 pre-emption is subject to waiver, is not

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[7]Westvaco "is a large corporation [that] committ[ed] significant resources to defending this case." App. A at 18a).

inconsistent with national labor policy, nor does it condone "sidestepping", as the petitioners argue as their Reason IV (Pet. Cert. at 39). The policy is intact; all one need do is properly invoke the pre-emption defense. Indeed, in appropriate cases, considering the strong policy supporting § 301 pre-emption, courts may even afford relief from failure to timely invoke pre-emption. See Apponi v. Sunshine Biscuits, Inc., supra, and National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, supra.

What petitioners seek here, by claiming a right to their neglect under cover of "jurisdiction", is absolute dispensation from established, essentially equitable and understood rules of procedure and trial practice. They seek even to avoid the discretion of appellate

courts in deciding whether to reach issues not timely raised. The establishment of the rule sought by the petitioners - an absolute right to raise a § 301 pre-emption defense at any time, even after a jury verdict - is not necessary to discourage "sidestepping"; rather, the rule would encourage and reward dalliance, negligence, or worse, intentional manipulation of procedural and trial practice.

Unfairness

In addition to the unfairness discussed above, petitioners prejudiced Dolores Sweeney. Not only did the First Circuit state that "Westvaco had no good reason for its neglect" (App. A at 44a), it considered the "unfairness . . . obvious and aggravated here. . . . [where] Mrs. Sweeney might have tried to reshape

her case to avoid any need for contract interpretation had she know of the problem sooner." (App. A at 44a).

It is established that "substantive rights in labor relations can exists without interpreting collective-bargaining agreements." Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 411 (1988). "[N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301. . . ." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985). Both Lingle and Allis-Chalmers recognize considerable freedom for operation of the states' police power. Mrs. Sweeney may well have been able to de-emphasize or eliminate any aspect of her claim that may have impacted § 301, she may have developed further those

aspects of the defendants' behavior not impacted by § 301.[8] Certainly harassing, taunting, and humiliating behavior (App. A at 9a) offered such opportunities.

II. THIS CASE DOES NOT PRESENT THE ISSUE SOUGHT TO BE REVIEWED IN THE CLEAR AND UNEQUIVOCAL MANNER NECESSARY FOR CERTIORARI REVIEW.

Through the course of more than three years of litigation, including seven arduous days of jury trial, the petitioners and their counsel were content to view this matter as simply a tort case (App. A at 53a). The petitioners, now in

[8]Petitioners disparage, as condoning "artful pleading," the First Circuit's observation that Mrs. Sweeney may have "reshaped" her claim. (Pet. Cert. at 51-52, n.15). Petitioners' criticism is unjustified. Lingle and Allis-Chalmers contemplate legitimate claims within the labor context as displayed above (see text at 27), and "sidestepping" by "artful pleading" is already well subject to discovery, motions, and even removal (see footnote 4).

extremis, attempt in their "Statement of The Case" to cast this matter simply as a labor-management case, endeavoring to posture it as a simple and clean question respecting the pre-emptive reach of § 301. The underlying facts and the decision of the First Circuit belie this. As a matter of simple justice, it cannot be said that harassment, taunting, and humiliation, "behavior of unusual callousness or cruelty" (App. A at 9a), are rights of management under any labor agreement. Additionally, the First Circuit found it unnecessary to reach the question of whether § 301 actually applied to the circumstances of this case (App. A at 23a).

The First Circuit did not decide whether certain or any of the aspects of the conduct of the defendants required

interpretation of the labor agreement so as to trigger § 301 pre-emption in the first place; nor did the court decide whether Dolores Sweeney, whose claim was independent under state law of any claim of George Sweeney, who was not a party to the labor agreement, and who had no rights or recourse under it, was pre-empted by § 301.[9]

Thus, petitioners' representation that "[t]he instant case presents this Court with an opportunity to address directly the issue of whether an otherwise valid assertion of § 301 preemption may

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[9]These several issues were fully briefed before the First Circuit by Plaintiff-Appellant Dolores Sweeney: Interpretation of agreement not required, § 301 inapplicable (Pl. Br. 1st Cir. at 45-49); Dolores Sweeney's claim independent, not party to agreement, not pre-empted by § 301 (Pl. Br. 1st Cir. at 38-45), and argued here (Argument III) as providing alternative grounds to support the judgment below.

be waived by a party or raised at any time" is an overstatement of the record ("Pet. Cert." at 23) (emphasis added). A serious question of the appropriateness of this case for certiorari review on the issue posited by the petitioners is presented. It is not presented in the "clear and unequivocal manner which is so necessary for proper adjudication in this Court." Lear, Inc. v. Adkins, 395 U.S. 653, 675 (1969). The question is precariously presented at best.

III. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI REVIEW AS THE JUDGMENT IS SUPPORTABLE ON ALTERNATIVE GROUNDS.

This Court refuses to grant a writ of certiorari where there are alternative grounds for finding that the judgment below is correct. See Colorado v. Nunez, 465 U.S. 324 (1984). The "precedents [of

this Court] establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." United States v. Arthur Young & Co., 465 U.S. 805, 814, n.12 (1984); United States v. New York Telephone Co., 434 U.S. 159, 166, n. 8 (1977). There are at least three such grounds here.

(1) The Claim Challenging Defendants' Conduct Was Not Pre-empted.

A fair reading of the proofs before the jury will demonstrate that although the infliction of emotional distress aspect of the claim occurred in an employment context, interpretation of the labor agreement was not in dispute. Indeed, as in Lingle v. Norge Division of Magic Chef, 486 U.S. at 407, the "factual ques-

tions pertain[ed] to . . . the conduct and motivation[s] of the [defendants]." Manner of conduct, and motives of the supervisors were the issue, not rights under the contract to issue the warning, review safety, operate machines at production speed, or transfer George Sweeney to the tool crib.

The First Circuit found that George Sweeney was "harassed, taunted, and humiliated" (App. A at 8a), that the defendants behavior was of "unusual callousness or cruelty." (App. A at 9a). Such behavior cannot reasonably be within the rights of an employer under any contract. E.g., Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 138-137 (7th Cir. 1987) (callousness, humiliation, insult, vexation certainly not pre-empted by § 301); Paradis v. United

Technologies, Pratt & Whitney Div., 672 F.Supp. 67, 71 (D. Conn. 1987) (harassment not pre-empted under § 301); Alpha Beta, Inc., v. Superior Court, 244 Cal.Rptr. 414 (Cal. App. 1st Dist. 1988) (personal abuse not pre-empted by § 301).

The First Circuit stated:

> The case in its present posture does not offer a specific interpretation of any word contained in the relevant collective bargaining agreement. Nor is there the slightest indication that any third party, any other worker, any union, any employer, is adversely affected by any collective bargaining agreement interpretation here at issue.

(App. A at 45a).

Thus, there was no occasion to interpret the contract.

(2) Dolores Sweeney's Claim Was Independent Under State Law, Not Subject to Pre-emption.

As the First Circuit found, at the time the cause of action arose a loss of consortium claim was independent under Massachusetts tort law of the claims of the other spouse (App. A at 10a). Feltch v. General Rental Co., 383 Mass. 603, 421 N.E.2d 67 (1981) (a plaintiff's recovery for loss of consortium is not to be reduced by the proportion of negligence attributable to the plaintiff's spouse under comparative negligence statute); Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 413 N.E.2d 690 (1980) (workers compensation statute does not bar employee's spouse from suing the employer for loss of consortium due to injury of employee). Accordingly, Dolores Sweeney's claim was not pre-empted by § 301. See

Adkins v. General Motors Corp., 556 F.Supp. 452, 458 (S.D.Ohio 1983) (loss of consortium claim not pre-empted by § 301, "under Ohio law . . . a spouse [has] a separate and independent cause of action for loss of consortium.").[10]

(3) Dolores Sweeney Was Not A Party to The Labor Agreement, Had No Access Under It, Was Not Bound By It, Thus Her Claim Was Not Pre-empted.

The basic principle that one not a party to a contract is not bound by the terms of that contract (and has no recourse under it) applies in the application of § 301 pre-emption. While it may not be denied that a policy of consisten-

[10]The case of Johnson v. Anheuser-Busch, 876 F.2d 620 (8th Cir. 1989) relied on by the Magistrate (App. B at 45b) is inapposite, because under the state law there applicable, loss of consortium was a derivative claim arising out of the tort claims of the injured spouse.

cy underlies pre-emption law, it seems inappropriate, at best, to support consistency in interpretation of the "bargain" of the parties to the labor agreement on the backs of a stranger. Indeed, this is implicit in the otherwise express terms of the opinions of this Court. In Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962), the Court's concern was that "conflicting legal concepts might substantially impede the parties' willingness to agree to terms. . . ." (emphasis added). In Allis-Chalmers v. Lueck, 471 U.S. at 217, a tenet of the Court's holding was that "the parties . . . are free to bargain about what 'reasonable' performance of their contract obligation entails." (emphasis added). The Court was concerned in Allis-Chalmers v. Lueck, supra at 220, that "[a] rule that permit-

ted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness." (emphasis added).

The principle that a stranger to the contract has no rights under it, and is not precluded by it, has been implemented by this Court even in the preclusive context of so-called "Garmon" jurisdictional pre-emption. San Diego Building Trades Council v. Garmon, 359 U.S. 236. "We have recognized an exception for conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board." International Longshoremen's Association v. Davis, supra at 393, n.10 (citing Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978)). Obviously, Dolores

Sweeney had no means of pursuing a grievance or arbitration under the agreement.

"'[C]ourts have generally held that [§ 301] creates federal jurisdiction only over parties to the contract being sued upon.' Metropolitan Detroit Bricklayers v. J.E. Hoetger & Co., 672 F.2d 580, 583 (6th Cir.1982) (emphasis added)." Lee v. General Motors Corp., 684 F.Supp. 163, 165 (E.D.Mich. 1987). Accordingly, only those parties are pre-empted by its application. In Lee v. General Motors Corp. supra, the court held that a female employee's state law claims against her employer and a security guard were not pre-empted, because she lacked standing to sue under § 301, as she was neither a signatory to the collective bargaining agreement between employer and guard workers' union, nor was she a member of

that union, and she was not a third-party beneficiary of agreement. See also Adkins v. General Motors Corp., supra at 458 (loss of consortium claim not pre-empted under § 301 precisely because the consortium plaintiffs, wives of employees of the defendant, had no standing to sue under § 301).

IV. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION OF WHETHER A § 301 PRE-EMPTION DEFENSE IS WAIVABLE.

The First Circuit observed that in Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1043-44 (9th Cir. 1987), the Ninth Circuit expressly held that a § 301 pre-emption defense is waivable and that the parties "do not posses an absolute right to raise it for the first time on appeal." (App. A at

37a). "Similarly", the court stated, the Sixth Circuit in Apponi v. Sunshine Biscuits, Inc., supra, and the Seventh Circuit in National Metalcrafters v. McNeil, supra, "have held that a defendant may raise a § 301 pre-emption argument for the first time on appeal in special circumstances,[11] thereby holding that the claim is not one that the parties have an absolute right to raise at any time." (App. A at 37a-38a) (emphasis in original).

Thus, the First Circuit concluded:

> [W]e agree with the Ninth Circuit and with what we take as the holding implicit in the approach of the Sixth and Seventh Circuits, namely, that in an appropriate case, a party can waive § 301 pre-emption; the parties do not have an absolute right to raise that ar-

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[11]These "special circumstances" are addressed hereinafter at page 42.

gument at any stage they wish in the proceedings.

(App. A at 42a).

As outlined in the Statement of the Case,[12] the First Circuit recognized as dicta, without analysis, the statement of the Third Circuit in Carpenters, supra at 469-70, that "if the issue of pre-emption were not jurisdictional, a strong case for waiver could be made on [the] facts." Nevertheless, petitioners offer this case as a "directly contrary holding" (Pet. Cert. at 17). The petitioners criticize the First Circuit, arguing that Carpenters was dictum only in a technical sense (Pet. Cert. at 26, n.9). But, dictum it remains. Moreover, the Third Circuit did not have the benefit of this Court's

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[12]See page 8 herein.

teaching in Davis. (See Argument V herein at page 47).

Accordingly, it does not appear that a substantial conflict, or indeed any conflict exists as to whether a § 301 pre-emption defense is waivable. Certainly, there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" as to warrant certiorari review. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) quoted in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955).

In National Metalcrafters, supra, and Apponi, supra, "special circumstances" prevailed. (App. A at 37a).

The Seventh Circuit decision in National Metalcrafters was fact specific. First, the defendant actually argued pre-

emption in the district court, albeit without specific reference to § 301. National Metalcrafters, supra at 825. Thus, the very fact that in National Metalcrafters the defense of pre-emption was raised to the extent that it was is an important distinction. Second, the court held that the issue of § 301 pre-emption in the case was intertwined with Garmon pre-emption under § 8 of the National Labor Relations Act. Indeed, the court concluded that the "dispute over vacation pay is doubly preempted; by section 301 of the Taft-Hartly Act and by section 8 of the National Labor Relations Act." National Metalcrafters, supra at 828 (emphasis added). Finally, National Metalcrafters was a case of declaratory judgment, disposed of in the district court upon a motion to dismiss not in-

volving protracted litigation and a "long and painful" jury trial as in the instant case. (App. B at 46b).

The Sixth Circuit in Apponi characterized pre-emption under § 301 as an "affirmative defense", but "declined to apply the waiver rule." Id. at 1215 (citing National Metalcrafters, supra at 825-826). The action was for was for breach of contract by the defendant in refusing to pay early retirement benefits under a collectively-bargained pension plan. The trial judge submitted a single factual issue to the jury - whether during the negotiation of the plan the defendant had made particular parol representations affecting early retirement. The jury found that the defendant had.

On appeal to the Sixth Circuit, the defendant raised the defense of pre-

emption under § 301. The Sixth Circuit held that the claim was pre-empted, but preserved, "as binding upon the parties" the jury finding that the defendant had made the representations. Apponi, supra at 1220. The court ordered the district court, on remand, to "instruct the jury that the representations were made." Id. In Apponi, the alleged breach was squarely within a collectively-bargained agreement, indeed the dispute arose directly out of labor negotiations themselves. Id. at 1215. The plaintiffs could relitigate the same factual disputes. Moreover, the plaintiffs were not prejudiced by belated consideration of preemption, because a jury finding favorable to the plaintiffs and central to their case was preserved.

Thus, in all these particulars, National Metalcrafters and Apponi are dis-

tinguishable on the facts from the case at bar. The decision of the First Circuit not to "forgive and overlook" the defendants' failure to timely raise preemption (App. A at 42a; 46a), distinguished National Metalcrafters and Apponi on the facts - on a "host of special circumstances" (App. A at 43a) - not on principles of law. The court found that in the instant case "the circumstances simply do not call for an exception." (App. A at 44a). "[C]onflict in decisions aris[ing] from differences in states of fact, and not in the application of a principle of law" do not justify granting a writ of certiorari. Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813 (1930) (per curiam; dismissing writ as improvidently granted).

V. THE RULING BELOW THAT A § 301 PRE-EMPTION DEFENSE IS WAIVABLE IS CONSISTENT WITH THIS COURT'S DECISION IN INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS.

This Court held in Davis that Garmon pre-emption was not waivable because Congress invested the NLRB with exclusive jurisdiction over claims under §§ 7 and 8 of the NLRA. Davis at 391. Petitioners attempt to gather from Davis that pre-emption under § 301 of the LMRA is not waivable. They argue, that as they had before the First Circuit, that for purposes of § 301 pre-emption, "the grievance and arbitration process under a collective bargaining agreement is . . . the analog" to exclusive forum jurisdiction under Garmon pre-emption. (Pet. Cert. at 36) (see App. A at 30a) The First Circuit's rejection of this argument dem-

onstrates clearly that the petitioners' reliance on Davis is fully misplaced.[13]

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[13]Petitioners argue, in support, that because this Court said in Caterpillar, supra at 393, that a complaint is viewed "from inception" as arising under federal law so as to constitute an exception to the "well pleaded complaint" rule, a state law claim may not be adjudicated even where a pre-emption or "arising under" argument is not made. (Pet. Cert. at 32-33) (see also footnote 4 herein). This certainly "overworks" Caterpillar, and is an attempt to resurface an argument made by the defendants (and rejected by the First Circuit), that, because in the removal context of § 301 "claims" courts have used the word jurisdiction, § 301 is "jurisdictional" in the sense that it cannot be waived (App. A at 38a-39a). The First Circuit stated: "But that is not what these cases hold." (App. A at 38a). The First Circuit recognized that while these cases employed the "protean word 'jurisdiction'" (App. A at 38a), they did not involve waiver (App. A at 39a). Rather, the court said, they "dealt with the question whether the district court had properly held that § 301 pre-empted the plaintiff's state-law claim, and whether there was a sufficient basis for 'arising under' jurisdiction after removal." (App. A at 39a). "[T]he term 'jurisdiction' . . . is a verbal coat of . . . many colors." Davis at 402 (Rehnquist, J., concurring, quoting Jus-

(continued...)

Among the elements of the court's analysis were that:

> the Supreme Court carefully limited its holding in Davis. It made clear that it was describing Congress's "jurisdictional" intent in respect to §§ 7 and 8 of the NLRA, not other statutes. . . . Moreover, the Court spoke of Congress's intent, in respect to pre-emption by §§ 7 and 8 of the NLRA, as involving "a choice-of-forum rather than a choice-of-law question." Davis, 476 U.S. at 391.

(App. A at 31a-32a) (citing Brown v. Trustees of Boston University, 891 F.2d 337, 363 (1st Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990)).[14] The court

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[13](...continued)
tice Frankfurter in United States v. Tucker Truck Lines, Inc., 344 U.S. 33, 39 (1952)).

[14]In the last quoted passage, the First Circuit was referring to this Court's language in Davis at 391, that:

> when a state proceeding or regulation is claimed to be pre-
>
> (continued...)

continued, that this Court had warned in Davis at 391, n.9, that:

> our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws.

The First Circuit concluded that "LMRA § 301 pre-emption (unlike NLRA §§ 7 & 8 pre-emption) concerns what law a decision maker must apply, not what forum must decide the dispute" (App. A at 36a).

The Ninth Circuit in Johnson, supra, had reached the same conclusion employing

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[14](...continued)
empted by the NLRA under Garmon, the issue is a choice-of forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under Garmon, then state jurisdiction is extinguished.

its prior interpretation in Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986), of this Court's opinion in Davis. The Ninth Circuit stated that in Gilchrist "we analyzed the reasoning in Davis and extrapolated the following rule: 'a preemption argument that affects the choice of forum rather than the choice of law is not waivable; thus it can be raised for the first time on appeal.'" Johnson, supra at 1043 (quoting Gilchrist, supra at 1907).[15]

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[15]State and federal courts are uniform in their understanding of this teaching of Davis: E.g., Dueringer v. General American Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988) (pre-emption involving "choice-of-law" is subject to waiver, citing Johnson, supra at 1043-44 and Gilchrist, supra at 1497 (9th Cir. 1986)); Castello v. Neely's TBA Dealer Supply, 776 S.W.2d 290 (Tex. Ct. App. 1989); Great North American Stationers v. Ball, 770 S.W.2d 631 (Tex. Ct. App. 1989) ("From the Court's conclusion [in Davis] we identify the following rule: a preemp-

(continued...)

In rejecting the defendants' analog argument that Congress intended grievance and arbitration as exclusive fora, the First Circuit reasoned, in part, that Congress could not have so intended in as much as Congress "does not require that collective bargaining agreements provide for grievance and arbitration" (App. A at 35a), and that it is abundantly clear that parties to a dispute "may waive the benefit of these procedures." (App. A at 35a).

In this the First Circuit seems clearly correct. In Litton Financial

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[15](...continued)
tion argument that affects the choice of forum rather than the choice of law is not subject to waiver; conversely, a pre-emption claim that affects only the law to be applied and not the court which may hear the dispute is waivable."); Hubred v. Control Data Corp., 442 N.W.2d 308 (Minn. 1989) (choice-of-law pre-emption waived).

Printing Division v. NLRB, 111 S.Ct.2215 (1991), this Court stated that it is "basic federal labor policy that 'arbitration is a matter of contract'", Litton at 2222 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)); that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law", Litton at 2222 (quoting Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974)); and "reaffirm[ed] . . . that under the NLRA arbitration is a matter of consent. . . ." Litton at 2222.

The First Circuit's distinction between choice-of-forum and choice-of-law pre-emption recognizes that choice-of-forum pre-emption in the labor law context, as this Court held in Davis, is integral to Congress's intention to have

the NLRB assume primary responsibility for developing federal labor laws under the NLRA. Through that mechanism, Congress provided for uniform outcome, on a national basis, of disputes arising under the NLRA.[16]

The choice-of-law issue implicated by this case is decidedly different. Almost by definition, there can be no interest in the uniform outcome of matters arising under collective bargaining agreements. To the contrary, each arbitrator is expected to interpret and apply

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[16]It bears repeating, however, that four members of the Davis Court disagreed that Congress intended in establishing the "jurisdiction" of the NLRB to "threat[en] orderly judicial proceeding" by precluding judicial waiver. Davis at 399 (Rehnquist, J., concurring, joined by Powell, J., Stevens, J., O'Connor, J.) (see text herein at page 22). They believed this to be a "perverse application" of "jurisdiction" by the Court. Id. at 402.

the agreement according to its specific language, viewed in light of the "common law of the shop." United Steel Workers of America v. Warrior & Gulf Navigation Co., supra at 582.[17] So viewed, the interest protected by choice-of-law pre-emption is to encourage the parties resort to the grievance-arbitration process. As has been demonstrated (Argument I herein), the ruling below does not threaten the integrity of that process. Therefore, the reliance of the First Circuit upon the distinction in Davis of choice-of-forum and choice-of-law pre-emption is

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[17]Indeed, there is no formal doctrine of stare decisis in labor arbitration. See generally F. Elkouri & E. Elkouri, How Arbitration Works 414-419 (4th ed. BNA 1985). Moreover, Given the relative informality of grievance and arbitration, and the multitude of arbitrators, there is no assurance of uniformity of outcome or interpretation even within the same agreement, much less from one agreement to another.

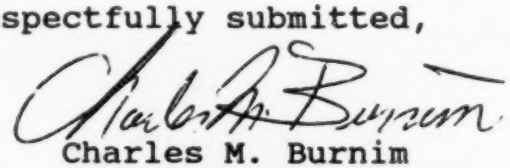
fully consistent with and does not undermine established labor policy.

CONCLUSION

Contrary to the representations made by the petitioners in their Conclusion, their petition does not involve any "question that has divided the circuits" with respect to whether a § 301 preemption defense is waivable; and given the numerous opportunities in the procedure and trial practice to test the applicability of § 301, it does not appear to be a recurring question - that many litigants find themselves in the posture of waiver as do the petitioners (Pet. Cert. at 52-53). Moreover, this petition does not present the question in a manner appropriate for certiorari review. The ruling of the First Circuit sought to be reviewed is fully consistent with both

federal labor policy and the need for orderly judicial proceedings. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



Charles M. Burnim
Counsel of Record
for Respondent
508 Donahue Building
Beacon Hill
41 Temple Street
Boston, Ma. 02114
617-573-8614

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